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16  
17 **UNITED STATES DISTRICT COURT**  
18 **NORTHERN DISTRICT OF CALIFORNIA**  
19 **SAN JOSE DIVISION**

20 ZYNGA INC.,  
21 Plaintiff,  
22 v.  
23 VOSTU USA, INC., et al.,  
Defendants.

24  
25 **AND COUNTERCLAIMS**  
26  
27  
28

**CASE NO. CV 11-2959 EJD**

**VOSTU'S MEMORANDUM OF POINTS  
AND AUTHORITIES OPPOSING  
ZYNGA'S MOTION TO DISMISS OR  
STRIKE COUNTERCLAIMS**

DATE: February 17, 2012

TIME: 9:00 a.m.

PLACE: Courtroom 1, 5th Floor

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Zynga's motion to dismiss or strike Vostu's counterclaims should be denied on the papers.  
3 Zynga does not even purport to assert that Vostu's counterclaims fail to allege facts sufficient to  
4 entitle Vostu to a declaration that its games do not infringe any Zynga copyright. For that reason  
5 alone, Zynga's motion fails under Rule 12(b)(6). The crux of Zynga's motion is that the Court  
6 should strike Vostu's counterclaims under Rule 12(f), but that request also fails for multiple reasons.

7 First, longstanding law from the Ninth Circuit and courts in this district is clear that, even if  
8 Vostu's counterclaims were simply "mirror images" of Zynga's complaint (which they *are not*), the  
9 Court should not automatically strike them. *See, e.g., Maulsby v. Conzevoy*, 161 F.2d 165, 167 &  
10 nn. 5-6 (9th Cir. 1947); *Echostar Satellite LLC v. Freetech Inc.*, No. C 07-06124 (JW), 2008 U.S.  
11 Dist. LEXIS 123261, \*8 (N.D. Cal. May 8, 2008) (Judge (now Chief Judge) Ware); *Castaline v.*  
12 *Aaron Muellers Arts*, No. C 09-02543 CRB, 2010 WL 583944, at \*2 (N.D. Cal. Feb. 16, 2010)  
13 (Judge Breyer). On the contrary, as Judge Breyer has explained, the Court should not dismiss even  
14 mirror-image counterclaims if they "serve any useful purpose." *Castaline*, 2010 WL 583944, at \*2  
15 (quotations omitted). In this case, Vostu's counterclaims serve a number of important purposes:

16 (a) The counterclaims identify a broad range of relevant facts in the dispute that  
17 Zynga did not identify (and indeed avoided) in its complaint. The complaint artfully dodged  
18 facts concerning the lack of originality of many elements that Zynga claims, the fact that  
19 Zynga seeks primarily to protect ideas (either entirely in the abstract or as "merged" with  
20 expressions), the functionality of many of Zynga's claimed elements, and the standard nature  
21 of many of Zynga's elements in light of the stylized characteristics of the genres of games in  
22 the case. Because the counterclaims will require Zynga to admit or deny the allegations, the  
23 parties can narrow facts and issues on undisputed matters.

24 (b) The counterclaims allow Vostu to resolve the issues expeditiously because  
25 under Rule 57, Fed. R. Civ. P., "[t]he court may order a speedy hearing of a declaratory-  
26 judgment action." The faster this case addresses Vostu's numerous challenges to Zynga's  
27 claims, the less harm Zynga can inflict through collateral damage efforts. Moreover, as this  
28 Court knows, Zynga has sued in Brazil where, after preparing a case for five months, it took

1 advantage of instantaneous *ex parte* procedures to launch a surprise attack and where  
2 discovery is much more limited than in the U.S. Discovery here may be useful in both cases.  
3 As a practical matter, Vostu wants this case to move forward as quickly as possible so that  
4 any discovery may be available for the Brazil case before that case concludes. Having the  
5 same evidence available in both cases helps ensure consistent outcomes.

6 (c) The counterclaims here also guarantee that Vostu can force a final resolution  
7 of the entire dispute. Zynga trumpeted its incendiary complaint with much fanfare, but ever  
8 since Vostu expressed an interest in early mutual discovery Zynga has shown no interest in  
9 moving this case forward. For example, Zynga, *the plaintiff in the case*, recently made the  
10 incredible claim that it needed nearly a month to prepare for an initial Rule 26(f) conference  
11 of counsel at Vostu's request. It is no secret what is going on here: Zynga publicized its  
12 claims of infringement to freeze investment in and growth of an anticipated competitor, and  
13 Zynga now wants to leave the pending claims dangling over Vostu like a Sword of  
14 Damocles. Zynga's passive stance since Vostu's counterclaims further suggests that Zynga,  
15 having accomplished its collateral damage objectives, may wish to dismiss this action  
16 entirely to avoid the procedural protections and discovery of American courts in favor of  
17 proceeding solely in Brazil. Vostu's counterclaims will deny Zynga that option.

18 Second, Vostu's counterclaims are *not* "redundant" of Zynga's affirmative claims, as Zynga  
19 repeatedly and disingenuously contends. *See, e.g.*, Mot. at 1:12, 1:20, 4:7. Zynga concedes the  
20 claim of "redundancy" is not true, because the numerous, well-pleaded allegations in Vostu's  
21 counterclaims go far beyond what Zynga included in its complaint. Zynga tries to get around this  
22 inconvenient fact by labeling Vostu's non-mirror-image allegations "irrelevant." *See id.* at 2:11,  
23 3:10, 7:8. *Zynga cannot have it both ways*: Vostu's allegations cannot be both "redundant" of  
24 Zynga's complaint and "irrelevant" to that complaint. The reality is that Vostu's allegations are  
25 neither: Vostu's counterclaims identify a very broad range of relevant facts in the dispute—facts  
26 that Zynga did not identify and indeed purposefully sidestepped—in its complaint. Issues related to  
27 Zynga's "knowledge of Vostu," Zynga's "reputation among third parties" (in reality published  
28 reports of Zynga's copying its games from others), "Zynga's communications with Vostu" (in

1 reality Zynga's business approaches to Vostu with no apparent concern about Vostu's games despite  
 2 knowledge of the games), and the like are not "irrelevant." *Id.* at 7:9-10. They instead relate  
 3 directly to core issues, including, among others, whether the game elements at issue are original to  
 4 Zynga (and not copied from others), as is necessary for Zynga to claim copyright over them. *See*  
 5 *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Zynga obviously would prefer  
 6 to avoid admitting the truth of Vostu's allegations for as long as possible, but that is not a reason for  
 7 striking Vostu's properly pleaded counterclaims.

8 The Court should deny Zynga's motion, and the Court can and should do so on the papers.  
 9 Zynga noticed its hearing for February 17, 2012—*nearly five months from the filing of this*  
 10 *opposition*. Waiting for the hearing delays Zynga's obligation to admit or deny the counterclaims'  
 11 allegations and undercuts the purpose of the declaratory judgment procedure.

## 12 II. FACTUAL BACKGROUND

13 On June 16, 2011, Zynga sued the Vostu companies ("Vostu") for allegedly copying Zynga's  
 14 business, game genres, ideas, and certain elements of its video games. Zynga's suit is far-reaching  
 15 and challenges five Vostu games as well as Vostu's choice of game genres, its philanthropic  
 16 activities, and even the color of Vostu's logotype. Zynga's complaint relies on a series of  
 17 deceptively damning screen shots and accompanying allegations that take elements from each  
 18 party's games out of context. Zynga's complaint omits facts about the social gaming industry and  
 19 creative contexts in which both companies compete. The complaint avoided facts that undermine  
 20 the scope of protection of Zynga's games and give the lie to Zynga's claims of substantial similarity  
 21 of the parties' games. Zynga's complaint was as misleading as it was ostensibly detailed.  
 22 Simultaneously with the filing of its complaint, Zynga took a number of actions to publicize this  
 23 case and inflict collateral damage on its upcoming competitor. Zynga published its complaint to the  
 24 public through the highly influential and widely followed blog TechCrunch, which immediately  
 25 reacted to the complaint by condemning Vostu—all before Vostu even knew about the case or saw  
 26 the complaint. Zynga uses the blogosphere as a weapon and its allegations in this case as the  
 27 ammunition for that weapon, regardless of the truth of the allegations. Declaration of Carolyn  
 28 Hoecker Luedtke ("Luedtke Dec.") ¶¶ 2, 3 and Exhs. A-B.

1 On July 20, 2011, Vostu answered Zynga's complaint and filed counterclaims on July 20,  
2 2011. In addition to answering 86 paragraphs of allegations by Zynga, Vostu pleaded robust and  
3 fact-specific counterclaims seeking declarations that Vostu does not infringe any of the many rights  
4 that Zynga appears to claim. The allegations in Vostu's counterclaims go well beyond both the  
5 allegations of Zynga's complaint and Vostu's listing of its affirmative defenses, and include  
6 numerous, well-pleaded factual allegations that all relate directly to whether Vostu has infringed any  
7 Zynga copyright in any of the games in issue.

8 Since Vostu filed its counterclaims, Zynga has accelerated its litigation efforts elsewhere and  
9 has tried to "slow boat" this case. First, as this Court well knows, Zynga filed a parallel lawsuit in  
10 Brazil and, without providing Vostu any notice of the suit or its motion, sought and (initially)  
11 obtained an *ex parte* injunction. While that injunction has now been temporarily stayed, the fact  
12 remains that the discovery procedures in the two jurisdictions differ considerably, and critical  
13 documents and information relevant to the issues of non-infringement may be available only through  
14 discovery under the Federal Rules in this case.

15 Second, well aware of the procedural guarantees that apply in this Court, Zynga has  
16 demonstrated a commitment to having this case proceed as slowly as possible. Initially Zynga's  
17 counsel said it believed Vostu had copied Zynga's source code and Zynga wanted expedited  
18 discovery from Vostu to support a threatened preliminary injunction. When Vostu's counsel  
19 expressed its desire for expedited *mutual* discovery, with an immediate exchange of source code of  
20 both parties for an immediate comparison, Zynga's interest in discovery came to a screeching halt.  
21 Vostu communicated repeatedly to Zynga its desire for a prompt exchange of source code; Zynga  
22 dragged its feet. Vostu then formally requested a Rule 26(f) conference of counsel so that discovery  
23 could begin; Zynga said it would be unable to prepare for such a conference for three weeks, and it  
24 stalled both holding the Rule 26(f) conference and the opening of discovery. Luedtke Dec ¶¶ 4-9  
25 and Exh. C-E. It is remarkable for such a hard-hitting plaintiff—and one so vigorous in the later-  
26 filed Brazil litigation—to become so completely inert in its *first-filed* case in its *home* court.  
27 Zynga's delay and passivity here since it filed the Brazil action underscore why Vostu's declaratory  
28 relief counterclaims serve such important purposes. Zynga's actions suggest that, having discovered

the procedural advantages of a foreign jurisdiction with minimal discovery and with *ex parte* communications between litigants and courts, Zynga may simply seek to dismiss this case without prejudice so that it can confine the dispute to a trial by ambush in Brazil while leaving the broader dispute in the United States unresolved and hanging over Vostu's head, even (or especially) in case the Brazilian courts rule in Vostu's favor. As we explain below, Zynga's abusive tactics cannot succeed so long as Vostu's counterclaims proceed here.

### III. ARGUMENT

#### A. Legal Standard: The Application of Rules 12(b)(6) and 12(f)

Zynga brings its motion under Federal Rules of Civil Procedure 12(b)(6) and 12(f). Rule 12(b)(6) allows dismissal when a claimant fails to state a claim upon which relief can be granted. For purposes of Rule 12(b)(6), the court presumes the truth of all factual allegations in the challenged pleading and draws all reasonable inferences in favor of the non-moving party. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000). When considering a Rule 12(b)(6) motion, the "court may not look beyond" the challenged pleading. *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("The focus of any Rule 12(b)(6) dismissal ... is the complaint.") Dismissal is only proper in "extraordinary" cases. *U.S. v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). *Here, Zynga does not even assert that Vostu's counterclaims themselves fail to state claims* for relief. Dismissal under Rule 12(b)(6) is therefore improper.

The core of Zynga's motion, instead, is that Vostu's counterclaims are redundant. Rule 12(f) is the relevant rule for redundant claims, not Rule 12(b)(6). *Cruz v. Dollar Tree Stores, Inc.*, No. 07-2050, 2007 WL 2729214, at \*9-10 n.3 (N.D. Cal. Sep. 18, 2007) (citing Fed. R. Civ. P. 12(f)). Rule 12(f) permits the "court [to] strike from a pleading . . . any redundant . . . matter." "Motions to strike are disfavored, and the remedy of striking a pleading should generally be granted only to avoid prejudice to the moving party or when it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation." *Wolk v. Green*, 516 F. Supp. 2d 1121, 1133 -34 (N.D. Cal. 2007). "Rule 12(f) Motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delay

tactic.” *In re Wal-Mart Stores, Inc. Wage and Hour Litigation*, 505 F. Supp. 2d 609, 614 (N.D. Cal. 2007). “Any doubt concerning the import of the allegations to be stricken weighs in favor of denying the motion to strike.” *Id.*

**B. Vostu’s Counterclaims Are Appropriate and Valuable in This Case.**

Zynga mischaracterizes Vostu’s counterclaims as “mirror image.” In fact, as shown above, while the claims and counterclaims both concern copyright infringement, the factual allegations are anything *but* mirror-image. Vostu’s counterclaims have reframed this dispute by expanding the allegations to capture a fuller range of key facts in this complex case. It is significant that Zynga tried to reframe the dispute in Brazil: the complaint it filed there, after facing Vostu’s counterclaims here, relied upon a vastly different, but similarly deceptive, selection of elements from the very same games at issue in both cases. Zynga’s dramatic shift in two different cases, involving exactly the same games, reveals the importance of Vostu’s counterclaims in framing the case.

In any event, as a legal matter, the mischaracterization of Vostu’s counterclaims as “mirror image” does not actually support striking the counterclaims. Courts routinely allow declaratory relief counterclaims in contexts such as this.

**1. Many Courts, Including the Ninth Circuit and This Court, Endorse So-Called “Mirror Image” Counterclaims.**

The Ninth Circuit has held that courts should not dismiss so-called “mirror-image” counterclaims at the pleadings stage because they serve legitimate purposes and are entirely proper. *Maulsby v. Conzevoy*, 161 F.2d 165, 167 & nn.5-6 (9th Cir. 1947), affirmed, after a full trial, the district court’s decision to keep declaratory relief counterclaims in the lawsuit; it cited favorably other courts’ approvals of mirror-image counterclaims. The Ninth Circuit held there was no “valid objection” to such counterclaims. *Id.* There could be no prejudice in hearing the counterclaims, which the court could easily dismiss after trial if appropriate, and which would impose no additional burden on the Court if truly identical. *Id.*

Decisions on point from this District have long permitted “mirror-image” declaratory judgment counterclaims. *See, e.g., Int’l Woodworkers of Am. v. McCloud River Lumber Co.*, 119 F. Supp. 475, 488 (N.D. Cal. 1953). In that case the court ruled that a defendant’s “counterclaim for a

1 declaratory judgment is permissible” even when it “rais[es] the same issues as those brought up by  
 2 the plaintiff's first cause of action and the defendant's answer thereto.” *Id.* Recent decisions take the  
 3 same position. In a copyright infringement case similar to this one, Judge Ware observed that  
 4 counterclaims for declaration of non-liability “are now commonly allowed.” *Echostar*, 2008 U.S.  
 5 Dist. LEXIS 123261, at \*8. *See also Castaline v. Aaron Muellers Arts*, No. C 09-02543 CRB, 2010  
 6 WL 583944, at \*2 (N.D. Cal. Feb. 16, 2010) (declining to dismiss counterclaims for  
 7 noninfringement of trademarks). “There was once some question whether a counterclaim based upon  
 8 essentially the same facts as the original claim should be dismissed as redundant, but . . .  
 9 counterclaims of this kind are now commonly allowed.” 10B Charles Alan Wright, et al., *Federal*  
 10 *Practice and Procedure* § 2758 (3d ed. 1998).

11 Courts outside the Ninth Circuit agree that “[m]erely because a counterclaim repeats the  
 12 issues raised in the original complaint does not automatically warrant dismissal.” *Caplan v. Am.*  
 13 *Baby, Inc.*, 582 F. Supp. 869, 870 (S.D.N.Y. 1984) (argument to dismiss mirror-image counterclaims  
 14 was “without merit”); *accord Oneida Tribe of Indians of Wis. v. Village of Hobart*, 500 F. Supp. 2d  
 15 1143, 1150 n.3 (E.D. Wis. 2007); *Dominion Elec. Mfg. Co. v. Edwin L. Wiegand Co.*, 126 F.2d 172,  
 16 174-75 (6th Cir. 1942); *United Wats, Inc. v. Cincinnati Ins. Co.*, 971 F. Supp. 1375, 1381 (D. Kan.  
 17 1997); *Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc.*, 457 F. Supp. 1158, 1161-62  
 18 (E.D. Pa. 1978) (“Courts have declined to fashion a rule preventing the assertion of a counterclaim  
 19 merely because the theory relied upon is the converse of that in the complaint.”). In fact, permitting  
 20 “mirror-image” counterclaims to go to trial is the “majority rule” and “the better policy.” *Oneida*  
 21 *Tribe of Indians of Wis.*, 500 F. Supp. 2d at 1150 n.3.

## 22 **2. The Federal Rules Support Declaratory Relief Counterclaims.**

23 The Federal Rules of Civil Procedure support declaratory relief counterclaims by allowing  
 24 declaratory judgments even in the face of another adequate remedy and by *requiring* that a defendant  
 25 bring as counterclaims any claims arising from the same transaction or occurrence as the complaint.

26 Federal Rule of Civil Procedure 57, which governs actions for declaratory relief, implicitly  
 27 endorses such counterclaims when it states that “[t]he existence of another adequate remedy does not  
 28 preclude a declaratory judgment that is otherwise appropriate.” Fed. R. Civ. P. 57. Accordingly,

even if merely surviving a plaintiff's claims would be an "adequate remedy," a declaratory judgment action may proceed. Moreover, as the court observed in *Employer Ins. of Wausau v. Pacer Int'l, Inc.*, No. 04-4563, 2005 WL 61481 (N.D. Ill. Jan. 11, 2005), a declaratory relief counterclaim "is by no means unusual; it is also, in all likelihood, compulsory" under Federal Rule of Civil 13 (counterclaims). *Id.* at \*3 (collecting cases). Thus, even a defendant with "arguably redundant" counterclaims must bring them or risk waiving them. *Id.*

### 3. Counterclaims Authorize a Defendant to Insist on a Resolution of the Issues.

Declaratory relief counterclaims allow a defendant to insist upon resolution of the claims, even if a plaintiff attempts to dismiss their case. Judge Ware summed up the reasoning:

Since the alleged conduct is of a continuing nature, were Plaintiffs to decide to dismiss this case, they would be free to bring an entirely new action based on substantially the same allegations. Defendant's counterclaims allow the Court to determine the rights and obligations of Defendant with respect to the products and services it provides whether or not Plaintiffs dismiss. Defendant is entitled to have the issue of its liability resolved now that it has been put in controversy by Plaintiffs.

*Echostar*, 2008 U.S. Dist. LEXIS 123261, at \*9. It is true that Rule 41(a) prevents a plaintiff from dismissing without prejudice without the approval of either the defendant or the court once the defendant answers. Fed. R. Civ. P. 41(a). But as Judge Ware noted above, where the alleged infringement is ongoing, a plaintiff can easily bring another complaint after unilaterally dismissing a case. Declaratory relief counterclaims also allow a defendant to invoke Rule 41 and insist that the Court resolve the parties' differences even if the plaintiff, at a later date, dismisses all or some of its claims under Rules 41 or 15.<sup>1</sup> Defendants who have asserted counterclaims enjoy additional protection. "If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication." Fed. R. Civ. P. 41(a)(2). The Sixth Circuit realized the importance of mirror-image counterclaims under these circumstances. "Rule 41 affords some measure of protection to defendants, yet it is limited to a dismissal upon such terms and

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<sup>1</sup> Rule 15, which governs amendments to pleadings, governs motions for the voluntary dismissal of particular claims.

conditions as the court deems proper.” *Dominion Elec.*, 126 F.2d at 174 (reversing district court’s dismissal of mirror-image counterclaims). Vostu’s counterclaims, therefore, are an important safeguard: they will entitle it to a determination of its rights even if Zynga decides to cut and run. When litigation here is merely part of a larger attack on a competitor, as simply one front that the plaintiff may abandon in the interest of the larger war, a defendant’s ability to insist on a determination of its rights is particularly important.

As noted above, Zynga’s recent conduct, including its remarkably passive approach to this case in the midst of an otherwise heated dispute, suggests that Vostu needs the protection that counterclaims afford to thwart abusive tactics by Zynga.

**4. In Intellectual Property Cases Such As This One, Counterclaims for a Declaration of Non-Liability Are Particularly Valuable.**

The rule in intellectual property cases is that courts should allow counterclaims for declarations of non-liability when the counterclaims question the validity or scope of the intellectual property rights at issue.<sup>2</sup> “In the patent and trademark realm, courts have found that counterclaims alleging patent or trademark invalidity should not be dismissed as redundant under Rule 12(f).” *Castaline*, 2010 WL at \*2. The same issue of possible challenges to validity applies to copyright cases. *See, e.g., Echostar*, 2008 U.S. Dist. LEXIS 123261.<sup>3</sup> Here, the focus is on the proper scope of protection for Zynga’s games in light of the full context that Zynga so carefully obscured in its complaint. Vostu challenges the scope of protection available for Zynga’s works. Now that Zynga

<sup>2</sup> In one of Zynga’s cited cases the court could not reach a holding on the merits because the defendants did not challenge dismissal of their allegedly mirror-image counterclaims. *UMG Recordings, Inc. v. Norwalk Distribs., Inc.*, No. SACV 02-1188 DOC (ANx), 2003 U.S. Dist LEXIS 26303, at \*3 (C.D. Cal. June 12, 2003) (noting that defendant did not counter plaintiff’s argument to dismiss counterclaims).

<sup>3</sup> Zynga cites a number of copyright cases that dismissed declaratory relief counterclaims, but they are all file-sharing cases. *See, e.g., Atlantic Recording Corp. v. Serrano*, 2007 U.S. Dist. LEXIS 95203 (S.D. Cal. Dec. 28, 2007); *Interscope Records v. Duty*, No. 05-CV-3744-PHX-FJM, 2006 U.S. Dist. LEXIS 20214 (D. Ariz. April 14, 2006); *Interscope Records v. Kimmel*, No. 3:07-CV-0108, 2007 U.S. Dist. LEXIS 43966 (N.D.N.Y. June 18, 2007). None of these cases involve the critical and wide-ranging challenges to protectability of numerous elements of extraordinarily complex works and the issue of probative similarity of alleged non-literal copying involved in Vostu’s counterclaims. As in the patent and trademark contexts, counterclaims for declarations of non-liability that raise questions about the validity and scope of copyrights should not be dismissed.

1 has sued it twice, Vostu deserves the chance to establish that Zynga's games deserve only limited  
2 protection.

3 **5. Sound Case Management Favors Vostu's Counterclaims.**

4 Principles of sound case management also support Vostu's counterclaims. The  
5 counterclaims narrow the issues, speed resolution of claims, and promote finality. All of these  
6 things increase judicial efficiency, with benefits to the courts and to litigants.

7 Zynga obviously does not want to answer Vostu's counterclaims. The counterclaims contain  
8 specific allegations about the broader context of Zynga's claims, as well as allegations about  
9 Zynga's own behavior, that it would rather duck than address. Keeping Vostu's counterclaims in the  
10 case will secure Zynga's answers to these allegations and will narrow and focus the issues, thereby  
11 conserving judicial resources. Zynga's responses may also include factual admissions that clarify  
12 the scope of disagreements and pave the way for an early dispositive motion or potential settlement.  
13 Obtaining key admissions through pleadings also avoids the objections, motion practice, and other  
14 time-consuming difficulties of the discovery process, quickly streamlining the case. Zynga may  
15 wish to postpone facing the facts Vostu has alleged, but the equities favor speedily defining the crux  
16 of the dispute.

17 Counterclaims for declarations of non-liability also "[e]nsure resolution of the dispute is not  
18 delayed." *Wasau*, 2005 WL 61481, at \*3. In fact, they are likely to speed resolution. First, and  
19 most explicitly, under Federal Rule of Civil Procedure 57 a "court may order a speedy hearing of a  
20 declaratory-judgment action." Fed. R. Civ. P. 57. Just as important, though, allowing counterclaims  
21 for declarations of non-liability puts the defendant in the plaintiff's seat and gives both parties the  
22 procedural initiative and incentive to finish the case quickly. Especially where Zynga seems content  
23 to let this case languish because it has latched onto another jurisdiction with fewer procedural  
24 protections for defendants, has focused on other ways to force an erstwhile competitor out of  
25 business, or has simply gotten cold feet, Vostu should have the power to drive the case to resolution.

26 Finally, declaratory relief counterclaims prompt more complete adjudication of a dispute.  
27 The "mere dismissal of a plaintiff's bill does not always adjudicate every aspect of the controversy or  
28 give the defendant all the relief to which he may be entitled." *Dominion Elec.*, 126 F.2d at 174.

Thus, it is best to wait for trial, when the contours and overlaps of claims and counterclaims will become clearer. There is no need to dismiss claims hastily, at the pleadings stage, without full knowledge. *Oneida Tribe of Indians of Wis.*, 500 F. Supp. 2d at 1150 n.3.

**C. It Is Particularly Inappropriate to Strike Declaratory Relief Counterclaims Before Factual Development.**

Due to the high standard for striking material under Rule 12(f), and due to the usefulness of counterclaims for declarations of non-liability, the better course is to allow such claims to proceed past the pleadings stage. Even the cases Zynga cites bear this out. *Stickrath v. Globalstar, Inc.*, No. C07-1941 TEH, 2008 WL 2050990, at \*5 (N.D. Cal. May 13, 2008), acknowledges that “early dismissal of a counterclaim under Rule 12(f) might be premature in some cases.”<sup>4</sup> “Doing so might ‘ignore[ ] the possibility that it is very difficult to determine whether the declaratory judgment counterclaim really is redundant prior to trial.’” *Id.* (quoting 6 Wright, et al., § 1406) (alteration in original). Once the case develops further, the court might consider dismissing declaratory relief counterclaims if they do not assist in shaping the case, but that has no bearing here.<sup>5</sup> At the pleading stage, however, it is difficult to predict what additional important issues a counterclaim for a declaration of non-liability will illuminate. And, in any event, even if a counterclaim were entirely duplicative, there is no additional burden in pursuing it.

<sup>4</sup> *Stickrath*, in fact, noted that intellectual property cases are particularly unsuited to dismissal of declaratory counterclaims. *Id.*

<sup>5</sup> Many of the cases Zynga cites occur in entirely different procedural postures. *Avery Dennison Corp. v. Acco Brands, Inc.*, No. CV 99-1877 DT (Mcx), 2000 WL 986995, (C.D. Cal. Feb. 22, 2000) (dismissing counterclaims after a year of litigation, when plaintiff moved for summary judgment); *Infra-Lab, Inc. v. KDS Nail Int’l*, No. 2:07-01270 WBS WFB, 2008 WL 4793305 (E.D. Cal. Oct. 27, 2008) (denying defendant’s motion for leave to add a counterclaim more than one year after it filed its answer); *Federal Deposit Ins. Corp. v. Bancinsure, Inc.*, 770 F. Supp. 496, 497-98 (D. Minn. 1991) (rejecting a counterclaim on a motion for summary judgment six months into litigation and years into investigation of the issues); *Rayman v. Peoples Sav. Corp.*, 735 F. Supp. 842, 851-52 (N.D. Ill. 1990) (denying motion for leave to file a counterclaim). Even farther afield, Zynga also cites cases dismissing counterclaims *after adjudication of the claims in the complaint*. See *Aldens, Inc. v. Packel*, 524 F.2d 38, 51-52 (3rd Cir. 1975) (dismissing mirror-image declaratory relief counterclaim as moot after granting summary judgment); *Veltman v. Norton Simon, Inc.*, 425 F. Supp. 774, 776 (D.C.N.Y. 1977) (dismissing the original action and then dismissing the counterclaim for declaratory judgment as moot).

1 **IV. CONCLUSION**

2 Vostu has asserted counterclaims that far better define this lawsuit than Zynga's complaint.  
3 Vostu's counterclaims articulate many facts and issues in the case in order to narrow the issues upon  
4 Zynga's response and to establish the proper scope of protection for Zynga's copyrights. The  
5 counterclaims are proper under the Federal Rules. By narrowing the facts and issues truly in dispute  
6 at the outset, they will expose hollow claims and move the litigation along more expeditiously.

7 In light of the stringent standard of a disfavored Rule 12(f) motion, the proper course is to  
8 keep Vostu's counterclaims in this case and reject Zynga's efforts to avoid or delay responding to  
9 the allegations. For these reasons, Vostu respectfully requests that the Court deny Zynga's motion  
10 upon completion of the briefing and without waiting months for the noticed hearing.

11 Dated: September 20, 2011.

Respectfully submitted,

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13  
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